Supreme Court, U.S.
FILED
991808 MAY 08 2000
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

October Term, 1999

Gary L. Smith

Petitioner,

v.

United States of America

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Petition for Writ of Certiorari

Gary L. Smith*
4620 North 89th Lane
Phoenix, Arizona 85037
(602) 872-0852

*Petitioner, In Propria Persona

58 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petitioner's due process rights are violated by the threatened collection of a $500.00 penalty assessed under 26 U.S.C. § 6682, for allegedly filing a false statement with respect to withholding, when the assessment of the penalty is not subject to the deficiency procedures of 26 U.S.C. §§ 6212 and 6213 and no hearing is afforded the Petitioner before the threatened collection of the penalty?

2. Whether the Anti-Injunction Act, 26 U.S.C. § 7421 bars an action challenging the validity of regulations that are claimed to be substantive by the Petitioner, but which were promulgated by the agency as interpretive regulations, when the challenge to the regulations does not attack the underlying tax policy of the regulations.

THE PARTIES

There are no other parties other than those listed on the cover of this Petition.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

THE PARTIES ii

TABLE OF AUTHORITIES iv

STATUTES AND REGULATIONS v

MISCELLANEOUS vi

OPINION OF THE COURT BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE AND FACTS 1

REASONS FOR GRANTING WRIT & ARGUMENT 4

1. In affirming the district court, the Ninth Circuit decided an important question of federal law, regarding the assessment and collection of penalties, in way that conflicts with relevant decisions of this Court. 4
2. In affirming the district court, the Ninth Circuit decided an important question of federal law, involving the Anti-Injunction Act and the validity of regulations that has not but should be decided by this Court. 6

CONCLUSION 8

TABLE OF AUTHORITIES

CITATION	PAGE
Central of Georgia Railway v. Wright, 207 US 127 (1907)	4
Columbia Broadcasting System v. United States, 316 US 407 (1942)	7
Department of Ins. of Indiana v. Church Members Relief Ass'n., 217 Ind. 58, 26 N.E.2d 51 (1940)	6
Lipke v. Lederer, 259 US 557 (1922)	5
O'Sullivan v. Felix, 233 US 318 (1914)	4
Regal Drug Corp v. Wardell, 260 US 386 (1922)	5

STATUTES AND REGULATIONS

SECTION	PAGE
26 CFR § 1.1441-5	2
26 CFR § 31.3402(f)(2)-1(g)	1, 2, 6
26 U.S.C. § 6212	i, 1
26 U.S.C. § 6213	i, 1
26 U.S.C. § 6682	i, 1, 3, 5, 6, 8
26 U.S.C. § 7205	1
26 U.S.C. § 7421	i, 1, 5
28 U.S.C § 1254(1)	1
5 U.S.C. § 553	1, 2, 7
5 U.S.C. § 603	1, 7
§ 29, National Prohibition Act, 41 Stat. 305, c. 85	1, 5
§ 35, National Prohibition Act, 41 Stat. 305, c. 85.	1, 5, 6

MISCELLANEOUS

CITATION	PAGE
46 FR 17547	2
46 FR 17566	2, 6
46 FR 17567	2, 7
Fifth Amendment to the Constitution	1

The Petitioner, Gary L. Smith, hereby Petitions this Court for its Writ of Certiorari to the United States Court of Appeals in and for the Ninth Circuit to review its August 26, 1999 Order summarily affirming the district court's judgment.

OPINION OF THE COURT BELOW

The decisions and orders of the United States District Court in and for the District of Arizona and the United States Court of Appeals in and for the Ninth Circuit were unpublished and are found in Appendix A to this Petition.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its order summarily affirming the District Court's judgment on August 26, 1999. [App., Pgs. A-1]. The Petitioner filed his Petition for Rehearing which was denied on February 8, 2000. [App., Pg. A-3]. The jurisdiction of this Court to review the judgment of the United States Court of Appeals by writ of certiorari is invoked under the provisions of 28 U.S.C § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following Constitutional provisions, statutes and regulations are involved. The text of each provision is found in Appendix B. Fifth Amendment to the Constitution; 5 U.S.C. §§ 553 and 603; 26 U.S.C. §§ 6212(a) and (b), 6213(a), 6682, 7205 and 7421; 26 CFR § 31.3402(f)(2)-1(g); §§ 29 and 35, National Prohibition Act, 41 Stat. 305, c. 85.

STATEMENT OF THE CASE AND FACTS

1. The Petitioner commenced this action seeking to enjoin the collection of a $500.00 penalty, allegedly assessed against him under 26 U.S.C. § 6682 for allegedly filing false statements with respect to withholding. The claim for the injunction was that the Petitioner was never provided the opportunity for a hearing before the collection of the penalty and that said statute permitting enforcement of the penalty without an opportunity for hearing

was invalid as a deprivation of property without due process of law. The assessment of the penalty is not subject to the deficiency procedures. (App., Pg. A-15)

2. The Petitioner further sought declaratory and injunctive relief against the enforcement of withholding regulations against the Petitioner. The claim for the injunction was that the regulations were improperly promulgated by the agency as interpretive regulations when the regulations are substantive regulations. (App., Pg. A-15)

3. On March 19, 1981, the Secretary of Treasury caused to be published in the Federal Register a Notice of Proposed Rulemaking, with respect to Withholding Exemption Certificates. (46 FR 17566). The Notice of Proposed Rulemaking cross-referenced the Temporary Regulations, published in the Federal Register on the same day at 46 FR 17547, as the text for the comment document. (App., Pg. A-21 - A-22, ¶¶ 3 & 4)

4. In the Regulatory Flexibility Act comment block, the Secretary (46 FR 17567) "concluded that the regulations proposed are interpretive and that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, these proposed regulations are not subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6)." (App., Pg. A-22, ¶ 5)

5. On January 26, 1982, after the comment period had expired, the Secretary of Treasure cause to be published the final regulations. (47 FR 3546). These regulations are now found in 26 CFR § 31.3402(f)(2)-1(g). (App., Pg. A-22, ¶ 6)

6. On February 6, 1997, the Petitioner filed a Declaration pursuant to 26 CFR § 1.1441-5 with Arizona Public Service Company (APS) stating that he was a citizen of the United States. He did not file a Form W-4 with APS (App., Pg. A-22, ¶ 7)

7. APS refused to comply with the provisions of the regulations and did not transmit the duplicate original as required by 26 CFR § 1.1441-5(c). (App., Pg. A-22, ¶ 8)

8. The Petitioner subsequently received two letters dated February 18, 1997 and September 16, 1997 indicating that the Internal Revenue Service had determined that the Petitioner had

filed an "Employee's Withholding Allowance Certificate, does not meet the requirements of the Internal Revenue Code and related Employment Tax Regulations." (App., Pg. A-22, ¶ 9)

9. This determination was "[b]ased on our information." The letter then stated that APS would be instructed to withhold from the Petitioner at the rate for a person that is Single with zero (0) allowances. The September 16, 1997 letter also threatened to impose a $500.00 penalty under 26 U.S.C. § 6682 for filing a false statement with respect to withholding. (App., Pg. A-22, ¶ 10)

10. The Petitioner objected in writing to the determinations on the ground that the February 18, 1997 and September 16, 1997 letter failed to state what the information was upon which they based their determination. The Petitioner requested a hearing before the assessment of the $500.00 and reconsideration of the determination of the withholding status. (App., Pg. A-23, ¶ 11)

11. On November 3, 1997, the Petitioner received notice that he had been assessed the $500.00 penalty for allegedly filing false statements with respect to withholding. The letter further offered the Petitioner an opportunity to submit an explanation why the penalty might be reduced or eliminated. (App., Pg. A-23, ¶ 12)

12. On November 10, 1997, the Petitioner requested an extension of time until such time as he received a hearing and the documentation upon which the IRS based its information. (App., Pg. A-23, ¶ 13)

13. On November 10, 1997, the Petitioner also made a Freedom of Information Act Request (FOIA) for the information involved in the determination of the withholding status and alleged assessment of the $500.00 penalty. (App., Pg. A-23, ¶ 14)

14. On or about December 1, 1997, the Petitioner received a Final Notice, notice of intent to levy with respect to the $500.00 penalty. (App., Pg. A-23, ¶ 15)

15. On or about February 5, 1998, the Petitioner received a letter stating that the IRS had stopped collection on the account for 12 weeks. (App., Pg. A-23, ¶ 16)

16. On or about April 13, 1998, the Petitioner received a second Final Notice, notice of intent to levy with respect to the $500.00 penalty. (App., Pg. A-23, ¶ 17)

17. On April 21, 1998, the Petitioner again responded to the April 13, 1998 Final Notice again repeating his request for the proceeding originally offered in the November 3, 1998 letter. (App., Pg. A-23, ¶ 18)

18. On or about July 1, 1998, the Plaintiff received his response to his November 10, 1997 FOIA. The request had gone through appeals to the Commissioner before it was ordered to be responded to. In the last paragraph of the letter, the responding officer stated that there were no documents responsive to the request for information regarding the penalty, because no penalty had been assessed. (App., Pg. A-23, ¶ 19)

REASONS FOR GRANTING WRIT & ARGUMENT

1. In affirming the district court, the Ninth Circuit decided an important question of federal law, regarding the assessment and collection of penalties, in way that conflicts with relevant decisions of this Court.

The function of a penalty clearly involves the "idea of punishment for infringement of the law," and a condition of its imposition is notice and hearing. *O'Sullivan v. Felix*, 233 US 318, 324 (1914). Even if the imposition of the penalty may be considered a tax levied by statutes enacted in plain pursuance of the tax power, if it is imposed with the intent to punish then, before it can be enforced, it must be preceded by opportunity to contest its validity. This is essential to due process of law. *Central of Georgia Railway v. Wright*, 207 US 127, 136 (1907)

As the undisputed facts set forth above show, prior to the alleged assessment of the of the $500.00 penalty, the Internal Revenue Service (IRS) offered the Petitioner an opportunity for a hearing. Then when the Petitioner timely requested the hearing, instead of proceeding with the hearing, the Petitioner next received the Notice that the $500.00 penalty would be assessed

against him. The IRS then followed up with threats of enforced collection, resulting in the Petitioner filing this action in District Court. What is disturbing about the threatened collection of the penalty without a hearing is that when the Petitioner attempted to obtain records of the assessment of the penalty he was told in response to his Freedom of Information Act Request that there were not records because no penalty had been assessed. See ¶ 18, on Page 4, ante.

The penalty imposed under 26 U.S.C. § 6682 is virtually identical to the type of penalty that was imposed under § 35 of the National Prohibition Act, 40 Stat. 305 (NPA). Evidence of a crime under § 29 of the NPA is an essential element to the imposition of the penalty imposed under § 35 of the NPA. *Lipke v. Lederer*, 259 US 557, 562 (1922); See also *Regal Drug Corp v. Wardell*, 260 US 386, 392 (1922). Contrary to the district courts findings (App., Pg. A-9 n.3), the initial language of 26 U.S.C. § 6682 also makes evidence of a crime an essential element to the imposition of the $500.00 penalty, *i.e.* "[i]n addition to any criminal penalty provided by law". The criminal penalty is imposed under 26 U.S.C. § 7205. Clearly 26 U.S.C. § 6682 is to 26 U.S.C. § 7205 what § 35 of the NPA was to § 29 of the NPA. The correlation is unmistakable.

Contrary to this Court's holdings in *Lipke*, supra and *Regal Drug*, supra, the district court held the Anti-Injunction Act, 26 U.S.C. § 7421 barred the action and dismissed the Complaint. (App., Pg. A-11). The Ninth Circuit summarily affirmed on the Respondent's Motion for Summary Affirmance. (App., A-1).

Since the Congress increased the penalty to $ 500.00 in the early 1980's, the Respondent has summarily imposed the penalty nationwide. The use of this penalty continues today in derogation of the due process rights of the people who have the penalty imposed against them. The fact that this unauthorized summary process has gone on for nearly 20 year without a proper challenge should not create validity in the process being used. Cf. *Department of Ins. of Indiana v. Church Members Relief Ass'n.*, 217 Ind. 58, 26 N.E.2d 51, 52 (1940):

> When the right to do a thing depends upon legislative authority, and the Legislature has failed to authorize it, or has forbidden it, no amount of acquiescence, or consent, or approval of the doing of it by a ministerial officer can create a right to do the thing which is unauthorized or forbidden.

Nothing in the 26 U.S.C. § 6682 authorized the Respondent to use its summary administrative enforcement authority without some sort of hearing, just as this Court found that the United States could not summarily enforce the penalty under § 35 of the NPA.

Accordingly, and for the foregoing reasons, this Court should issue its Writ of Certiorari to the Ninth Circuit Court of Appeals.

2. In affirming the district court, the Ninth Circuit decided an important question of federal law, involving the Anti-Injunction Act and the validity of regulations, that has not but should be decided by this court.

The Respondent has hidden behind its characterization of the disputed regulation[1] as an "interpretive" regulation. In concluding that the regulation was "interpretative", the agency made the following finding in its notice of proposed rulemaking (47 FR 17566, March 19, 1981) regarding compliance with the Regulatory Flexibility Act[2]:

> Although this document is a notice of proposed rulemaking which solicits public comment, the Internal Revenue Service has concluded that the regulations proposed herein are interpretive and that the notice and public procedure requirements of 5 U.S.C. § 553 do not apply. Accordingly, these proposed regulations do not constitute regulations subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).
> 47 FR 17567, March19, 1981

---

1 26 CFR § 31.3402(f)(2)-1(g)

2 5 U.S.C. § 601, *et. seq.*

The regulation purports to permit the Internal Revenue Service to summarily review a Withholding Statement (W-4) claiming exemption from withholding and summarily declare that such Withholding Statement is improper and order that the Withholding Rate be based upon the rate for a Single person claiming one (1) exemption. The question therefore, is whether this regulation is "substantive" or "interpretive."[3]

If the proposed regulation is substantive and therefore, subject to the provisions of 5 U.S.C. § 553, then the provisions of the Regulatory Flexibility Act apply and an initial flexibility analysis is required and the agency must "prepare and make available for public comment an initial regulatory flexibility analysis." 5 U.S.C. § 603(a). In concluding that the proposed regulations were "interpretive" the Respondent bypassed compliance with the Regulatory Flexibility Act. The agencies characterization of the regulations as "interpretive" is erroneous.

In deciding whether the regulation is interpretive or substantive, the particular label placed upon an act of an agency is not conclusive upon the Court. It is the substance of what the agency has done that is decisive and reviewing Courts must often examine the process by which an agency result is achieved rather than the result itself. *Columbia Broadcasting System v. United States* 316 US 407, 416 (1942).

Nothing in the Petitioner's challenge of the regulation addressed the underlying tax policy of the regulation. If the underlying tax policy is valid, then the agency can simply promulgate the regulation, only this time it would be subject to the rule making process of 5 U.S.C. § 553 and the Regulatory Flexibility Act. Therefore, this claim does not fall under the ambit of the Anti-Injunction Act.

---

3 Although the claim was raised in the Complaint and was fully briefed in both the district court and in the appellate court, neither court addressed the claim. Under the circumstances, in considering this petition, the Petitioner would urge this Court to consider the merits of the claim and find that the Anti-Injunction Act does not bar the claim or at least remand it back to the lower courts for consideration of the claim on its merits.

The regulation, like the $500.00 penalty, has been summarily used nationwide for nearly 20 years. The two are usually used in conjunction with each other, thereby twice summarily effecting the property rights of the citizens. The nearly 20 years of use of the invalid regulation should not give credence to the validity of the regulation.

Accordingly, and for the foregoing reasons, this Court should issue its Writ of Certiorari to the Ninth Circuit Court of Appeals.

CONCLUSION

Both the district court and the Ninth Circuit incorrectly concluded that the Anti-Injunction Act barred this action. To the extent that 26 U.S.C. § 6682 permits assessment and enforcement of the penalty before hearing, said statute is invalid as a deprivation of property without due process. The Anti-Injunction Act also does not bar the challenge of the regulation, which is challenged because it was not promulgated as required by law, and not for its underlying tax policy.

Accordingly, and for the foregoing reasons, this Court should issue its Writ of Certiorari to the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 8th day of May, 2000.

GARY L. SMITH
c/o 4620 North 89th Lane
Phoenix, Arizona 85037
(623) 872-0852
Appellant, In Pro Per

APPENDIX A

Page Left Blank

TABLE OF CONTENTS

APPENDIX A

SUBJECT	PAGE
NINTH CIRCUIT ORDER (August 26, 1999)	A-1
ORDER DENYING PETITION FOR REHEARING (February 8, 2000)	A-3
ORDER FROM DISTRICT COURT (March 12, 1999)	A-5
JUDGMENT DISTRICT COURT (March 12 1999)	A-13
COMPLAINT	A-15
STATEMENT OF FACTS (PLAINTIFF)	A-21
STATEMENT OF FACTS (DEFENDANT)	A-25

Page Left Blank

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED AUG 26, 1999

GARY L. SMITH	) No. 98-16068
	)
Plaintiff-Appellant	) D.C. No. CV-98-139 RCB
	) Arizona (Phoenix)
v.	)
	) ORDER
UNITED STATES OF AMERICA	)
	)
Defendant-Appellee	)
	)

Before: BROWINING, SCHROEDER, and PREGERSON.

A review of the record and appellant's opening brief indicates that the questions raised in this appeal are so insubstantial as not to need further argument. *See United States v. Hooton*, 693 F.2d 857 (9th Cir. 1982) (per curiam).

Accordingly, we summarily affirm the district court's judgment. All pending motions are denied as moot.

AFFIRMED.

Page Left Blank

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED FEB 08, 2000

GARY L. SMITH	)	No. 98-16068
	)	
Plaintiff-Appellant	)	D.C. No. CV-98-139 RCB
	)	Arizona (Phoenix)
v.	)	
	)	ORDER
UNITED STATES OF AMERICA	)	
	)	
Defendant-Appellee	)	
	)	

BeforeBROWINING, SCHROEDER, and PREGERSON.

The "petition for rehearing" filed September 9, 1999, is construed as a motion for reconsideration of this court's August 26, 1999, order. So construed, the motion is denied. *See* 9th Cir. R. 27-10.

Page Left Blank

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FILED MAR 12, 1999

GARY L. SMITH	)	
	)	
Plaintiff	)	No. CIV 98-0139 PHX RCB
v.	)	
	)	ORDER
UNITED STATES OF AMERICA	)	
	)	
Defendant-Appellee	)	
	)	

Pending before the court is Defendant's motion for summary judgment and Plaintiff's motion for leave to file a rebuttal memorandum. Having considered the parties' arguments, the court now rules.

I. BACKGROUND

On November 3, 1997, the Internal Revenue Service ("IRS") made a $500.00 penalty assessment under 26 U.S.C. § 6682 against Gary L. Smith ("Plaintiff") with respect to his 1997 federal income tax year. See Complaint ¶ 6. That statute authorizes the assessment of a $500.00 civil penalty for any false statement made with regard to withholdings if the taxpayer did not have a reasonable basis for the statement. See 26 U.S.C. § 6682. The IRS made the assessment based on an allegedly false statement contained in a declaration made by Plaintiff regarding the withholding of his income. See Complaint ¶ 6. Plaintiff has not paid the assessment, but rather filed this present lawsuit. See Defendant's Statement of Facts ¶ 3.

Plaintiff's complaint seeks to enjoin the $500.00 assessment and any action by the IRS in levying upon his property to satisfy this assessment. See Complaint ¶ E. Plaintiff also seeks a declaration that 26 U.S.C. § 6682 is unconstitutional. See id. ¶ C.

II. PLAINTIFF'S MOTION FOR LEAVE TO FILE REBUTTAL

Plaintiff moves the court for leave to file a rebuttal memorandum to Defendant's reply brief filed in support of the motion for summary judgment. Plaintiff contends that Defendant's reply brief is so far displaced from the issues that he needs an opportunity to file a rebuttal brief. Defendant opposes the motion for leave, arguing that the local rules of this court do not allow or contemplate such a rebuttal brief. Plaintiff, however, contends that this court can grant leave to file such a brief under its general discretionary powers.

Even if this court has the power to grant Plaintiff leave to file a rebuttal to Defendant's reply brief, the court finds that the circumstances do not warrant any further briefing on Defendant's motion for summary judgment. Contrary to Plaintiff's contentions, Defendant's reply brief touches solely on issues raised in Plaintiff's response. Therefore, the court will deny Plaintiff's motion for leave to file a rebuttal memorandum.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant bases its motion for summary judgment on the Anti-Injunction Act (or "Act") of the Internal Revenue Code, arguing that the Act deprives the court of subject matter jurisdiction over Plaintiff's claims. Although Defendant raises the issue of subject matter jurisdiction in a motion for summary judgment, the court will treat the motion as one suggesting dismissal based on lack of subject matter jurisdiction because the court cannot enter judgment but rather only dismiss the complaint if it lacks subject matter jurisdiction.

A. THE ANTI-INJUNCTION ACT

The Anti-Injunction Act provides in relevant part that, except as provided in specifically named sections of the Internal Revenue Code, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a). The purpose of this limitation on

lawsuits is to protect the government's interest in collecting taxes as expeditiously as possible, with the legal right to any disputed sums to be determined in a tax refund suit. See Bob Jones Univ. v. Simon, 416 U.S. 725, 736, 94 S. Ct. 2038, 2046 (1974). The United States Supreme Court has given an almost literal reading to the Act in depriving courts of subject matter jurisdiction over suits to enjoin any aspect of IRS activity involving the assessment or collection of federal taxes. See id. at 737, 94 S. Ct. at 2046; Enochs v. Williams Packina & Navigation Co., 370 U.S. 1, 82 S. Ct. 1125 (1962). A court must dismiss any suit that is barred by the Act. See Enochs, 370 U.S. at 7, 82 S. Ct. at 1129; Elias v. Connett, 908 F.2d 521, 523 9th Cir. 1990).

Aside from the statutory exceptions outlined in the Anti-Injunction Act itself, the United States Supreme Court has established one further exception to the Act. The Court has held that upon proof of two factors, the literal terms of the Act can be avoided: (1) irreparable injury to the taxpayer; and (2) certainty of success on the merits. See Bob Jones Univ., 416 U.S. at 737, 94 S. Ct. at 2046; Enochs, 370 U.S. at 6-7; 82 S. Ct. at 1128-29[1]. The irreparable injury requirement is the same as the prerequisite for injunctive relief in any case. See Bob Jones Univ., 416 U.S. at 737, 94 S. Ct. at 2046. To establish the requisite certainty of success, the taxpayer must show that "under no circumstances could the Government ultimately prevail"; it must be "apparent that, under the most liberal view of the law and the facts, the United States cannot establish its claim." Enochs, 370 U.S. at 7, 82 S. Ct. at 1129.

---

1 Both in his complaint and in his response to Defendant's motion for summary judgment, Plaintiff cites Regal Drug Corp. v. Wardell, 260 U.S. 386, 43 S. Ct. 152 (1922), and Lipke v. Lederer, 259 U.S. 557, 42 S. Ct. 549 (1922), as establishing an exception to the Anti-Injunction Act for suits seeking to enjoin the assessment of a penalty. The Supreme Court, however, has made it clear that the only non-statutory exception to the Anti-Injunction Act is the two-factor test enunciated in Enochs. See Bob Jones Univ., 416 U.S. at 742, 94 S. Ct. at 2048

B. VIABILITY OF COMPLAINT UNDER ANTI-INJUNCTION ACT

Plaintiff's complaint "is an action for injunctive relief." See Complaint ¶ 1. Plaintiff seeks an injunction enjoining the Defendant from satisfying the assessment of the alleged penalty and from causing the withholding of Plaintiff's income at the higher rate[2]. On its face, Plaintiff's complaint appears to be barred by the Act, unless an exception applies.

Plaintiff initially argues that the Act does not bar jurisdiction over his suit because he seeks to enjoin a penalty, not a tax. Plaintiff's argument, however, has no merit. The Internal Revenue Code itself states that, "[e]xcept as otherwise provided, any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter." 26 U.S.C. § 6671; see United States v. Molitor, 337 F.2d 917, 924 (9th Cir. 1964). Included in the referenced subchapter of penalties is 26 U.S.C. § 6682, and included in the referenced title is the Anti-Injunction Act. Courts are in unanimous agreement that a penalty assessed under 26 U.S.C. § 6682 is a tax under the meaning of the AntiInjunction Act, and thus cannot be enjoined unless an exception is met. See, e.c., Barr

---

2 Plaintiff's complaint also seeks declaratory relief in the form of a declaration that 26 U.S.C. § 6682 is unconstitutional and a declaration that the regulations upon which Defendant relied in assessing the penalty are invalid. The parties did not discuss these claims as a separate and distinct issue, as Defendant merely argued that they are barred by the Anti-Injunction Act

The Anti-Injunction Act does not bar a suit for declaratory relief, but the Declaratory Judgment Act itself limits the relief available, such that a court cannot declare the rights of litigating parties "with respect to Federal taxes." See 28 U.S.C. § 2201. The Anti-Injunction and Declaratory Judgment acts work coextensively in prohibiting suits based on the assessment of taxes. See Wyomina Trucking Ass'n Inc. v. Bentsen, 82 F.3d 930 (lOth Cir. 1996). The Supreme Court has stated that the Declaratory Judgment Act is "at least as broad as the Anti-Injunction Act" in prohibiting suits based on the assessment of taxes. Bob Jones Univ., 416 U.S. at 733 n.7, 94 S. Ct. at 2044 n.7. Therefore, if Plaintiff's request for injunctive relief is barred by the Anti-Injunction Act, his request for declaratory relief is also barred. See Professional Eng'rs Inc. v United States, 527 F.2d 597, 600 (4th Cir. 1975).

v. United States, 736 F.2d 1134, 1135 (7th Cir. 1984); Herring v. Moore, 735 F.2d 797, 798 (5th Cir. 1984); Souther v. Mihlbachler, 701 F.2d 131, 132 (10th Cir. 1983); see also Shaw v. United States, 331 F.2d 493, 496 (9th Cir. 1964)(holding that "penalties" assessed under 26 U.S.C. § 6672 are "taxes" within the meaning of the Anti-Injunction Act).[3] This court finds that the Act bars suits brought to enjoin the assessment of penalties under 26 U.S.C. § 6682.

Because the penalty assessment that Plaintiff seeks to enjoin is a "tax" under the meaning of the Anti-Injunction Act, Plaintiff must meet an exception or the court must dismiss his complaint. Plaintiff does not argue the applicability of any of the statutory exceptions listed in the Act, and after its review, the court does not find any of these exceptions relevant. Therefore, Plaintiff must meet the Supreme Court's judicially created exception to the Act, or his suit is barred.

To meet the judicially created exception, Plaintiff must demonstrate both irreparable injury and certainty of success on the merits. Plaintiff did not even attempt in his brief to demonstrate the existence of either factor, and the court does not find either present. To meet the first prong of the exception, Plaintiff must demonstrate that he has no remedy at law. See Church of Scientology of Cal. v. United States, 920 F.2d 1481, 1486 (9th Cir. 1990), cert. denied, 500 U.S. 952, 111 S. Ct. 2258 (1991). Plaintiff, however, has a remedy at law because he can pay the assessment in full, file a claim for a refund with respect to the amount paid, and, if the claim for a refund is denied, sue for a refund. See Souther, 701 F.2d at 132; see also 28 U.S.C. § 1346(a)(1). With regard to the second prong of the exception, Courts have upheld the assessment of a penalty under 26 U.S.C. § 6682 in similar cases. See Souther, 701 F.2d at 132; Griffith v. Commissioner of Internal Revenue, 598 F. Supp. 405, 406 (N.D.

---

3 Plaintiff mischaracterizes the penalty assessed under 26 U.S.C. § 6682 as a criminal penalty. It is clear that this penalty is civil in nature. See Capps v. Eggers, 782 F.2d 1341 (5th Cir. 1986)

Ohio 1983). Plaintiff, thus, has not met the judicially created exception to the Anti-Injunction Act.

Plaintiff raises one further argument as to why the Anti-Injunction Act does not bar his lawsuit. Plaintiff argues that the Administrative Procedure Act requires government agencies, including the IRS, to publish in the federal register a description of its organizational structure. See 5 U.S.C. § 552(a)(1). According to Plaintiff, if an agency fails to so publish its organizational structure, any actions taken by that agency are invalid. Finally, Plaintiff argues that the IRS has failed to so publish its organizational structure since 1974, and, hence, this court can invalidate the actions taken by that agency against him regardless of the Anti-Injunction Act.

The only case law Plaintiff cites on this subject comes from the Second Circuit in the 1950s involving the United States Post Office. In all of the cases cited, the courts invalidated the actions taken by the post office because of commingling of prosecutorial and judicial functions. Plaintiff argues that the IRS commingled such functions in his case because the same government employee both informed him that his withholding statement was invalid and assessed the $500 penalty. Plaintiff. however. mischaracterizes the functions engaged in by that employee, as the employee did not act in a judicial capacity. Plaintiff can still pay the assessment and then file a claim with the IRS for a refund. The IRS employee who makes the decision regarding the refund claim would be acting in a judicial capacity, not the employee who made the original assessment. Therefore, the case law that Plaintiff cites is distinguishable, and the court sees no basis for creating an exception to the Anti-Injunction Act based on 5 U.S.C. § 552(a)(1).[4]

---

4 Plaintiff does not argue that the regulations regarding the filing of a refund claim are not published. Therefore, by forcing Plaintiff to pay the $500 assessment and file a refund claim, the court is not forcing Plaintiff to resort to unpublished regulations and procedures.

IV. CONCLUSION

The Anti-Injunction Act bars any suit seeking to enjoin the assessment or collection of a tax. Plaintiff's complaint seeks to enjoin the assessment of a $500.00 tax and, thus, is barred unless Plaintiff meets an exception to the Anti-Injunction Act. Plaintiff does not meet any of the statutory exceptions or the judicially created exception to the Anti-Injunction Act. Because Plaintiff has not paid the $500.00 tax, this court does not have subject matter jurisdiction over his claims and must dismiss his complaint.

IT IS ORDERED denying Plaintiff's motion for leave to file a rebuttal memorandum, filed November 18, 1998 (doc. 21).

IT IS FURTHER ORDERED granting Defendant's motion for summary judgment (treated as suggestion to dismiss) based on lack of subject matter jurisdiction, filed August 11, 1998 (doc. 7). Accordingly, the court dismisses Plaintiff's complaint for lack of subject matter jurisdiction.

DATED this 11th day of March, 1999.

/s/ Robert C. Broomfield
Robert C. Broomfield
United States District Judge

Copies to pro se plaintiff and counsel of record

Page Left Blank

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FILED MAR 12, 1999

GARY L. SMITH	)	
	)	
Plaintiff	)	No. CIV 98-0139 PHX RCB
v.	)	
	)	ORDER
UNITED STATES OF AMERICA	)	
	)	
Defendant-Appellee	)	
	)	

_____ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED by way of this Court having granted Defendant's Motion for Summary Judgment (treated as a motion to dismiss), based on lack of subject matter jurisdiction, Plaintiff shall take nothing, this action and Complaint are hereby dismissed.

Date: March 12, 1999

RICHARD H. WEARE
District Court Executive/Clerk
/s/ Kathy M. Gercker
(By) Deputy Clerk

cc: all counsel

Page Left Blank

GARY L. SMITH
c/o 4620 North 89th Lane
Phoenix, Arizona 85037
(602) 872-0852
Plaintiff, In Pro Per

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

GARY L. SMITH	)	
	)	
Plaintiff	)	No. CIV 98-0139 PHX RCB
v.	)	
	)	
UNITED STATES OF AMERICA	)	COMPLAINT
	)	
Defendant-Appellee	)	
	)	

COMES NOW the Plaintiff, Gary L. Smith, and for his complaint alleges and avers as follows:

I. JURISDICTION AND VENUE

1. This is an action for injunctive relief and also arises under the Fourth, Fifth and Ninth Articles in Amendment to the Constitution of the United States of America.

2. This Court has jurisdiction under 28 United States Code (U.S.C.) §§ 1331 and 1340. Notwithstanding the Anti-Injunction Act, 26 U.S.C. § 7421, this Court has jurisdiction over the subject matter of the action and the parties under the exceptions set forth in *Regal Drug Corp. v. Wardell*, 260 US 386 (1922); *Lipke v. Lederer*, 259 US 557 (1922).

3. Venue is proper, as all acts complained of occurred or were caused to occur within the District of the State of Arizona.

II. PARTIES

4. Plaintiff Gary L. Smith is a single man. He was found at all material times in Maricopa County, Arizona.

5. Defendant United States is a Municipal Corporation, chartered in the District of Columbia and is doing business in the State of Arizona as a foreign Corporation known as the United States. In doing the acts herein alleged, the Defendant acted by and through an agency called the Internal Revenue Service (IRS) and its employees, officers, agents and servants.

III. CAUSE OF ACTION

Temporary Restraining Order, Preliminary and Permanent Injunction

6. The Plaintiff is credibly informed and believes and therefore alleges that on November 3, 1997, the Defendant has assessed a $500.00 penalty under 26 U.S.C. § 6682 for allegedly filing a false statement with respect to withholding.

7. The assessment was made against a statement in which he claimed of exemption from withholding. The Plaintiff's statement was rejected by the Defendant without prior notice that the withholding statement had been examined. The determination was made, according to the Defendant's letter, "based upon information available to them" without identifying what information was available to them. The letter further stated that the Plaintiff's withholding status with Arizona Public Service would be that as single with zero allowances. The $500.00 penalty was subsequently assessed after the withholding status was determined.

8. That the determination of the Plaintiff's withholding status arose of procedures set forth in [26 CFR, § 31.3402(f)(2)-1(g) *et. seq.*]. That these regulations upon which the validity of the Plaintiff's statement with respect to withholding was determined were not published with the Notice of Rule Making at the time the Notice was published in the Federal Register.

9. That 26 U.S.C. § 6682 authorizes the imposition of a $500.00 penalty "in addition to any criminal penalties provided for by law" is a penalty punishing a crime. The penalty was assessed without notice to the Plaintiff and without opportunity for hearing, and was enforced through the secret findings and summary action of executive officers.

10. The Plaintiff is credibly informed and believes and therefore alleges that the prosecutorial and adjudicative functions of the agency resulting in the imposition of the penalty under 26 U.S.C. § 6682 and the determination of the validity of the Plaintiff's statement with respect to withholding were improperly commingled in the hands of one official.

11. This commingling of the agency's prosecutorial and adjudicative functions is an organizational structure that is unpublished in the Federal Register and the Plaintiff is being required to resort to the organization not published and without actual notice.

12. The Plaintiff is credibly informed and believes that the Defendant is preparing to levy upon the Plaintiff's property in an effort to collect the $500.00 penalty assessment, in that notice and demand has been made for payment of said penalty, including but not limited to Notice of Intent to Levy.

13. The Plaintiff has further been subjected to withholding at a higher rate than is authorized by law as a result of the determination that the Plaintiff's statement with respect to withholding was invalid.

14. That as a direct and proximate result of the Defendant's determination of the validity of the Plaintiff's statement with respect to withholding under regulations that were not published during the Notice and Comment period; the imposition of a penalty punishing a crime, without affording the Plaintiff notice and opportunity to be heard, and that was enforced through the secret findings and summary action of an executive officer; the improper commingling of the prosecutorial and adjudicative function in one official; the requirement to resort to the organization of the commingled prosecutorial and adjudicative function that is not published; the Plaintiff has been deprived of his property without due process of law and will be further deprived of his property without due process of law, in violation of the Fourth, Fifth and Ninth Articles of Amendment to the Constitution of the United States of America.

15. To the extent that 26 U.S.C. § 6682 purports to permit the imposition of the penalty punishing a crime, without affording the Plaintiff notice and opportunity to be heard, and that was enforced through the secret findings and summary action of an executive officer; permits the improper commingling of the prosecutorial and adjudicative function in one official; requires the Plaintiff to resort to the organization of the commingled prosecutorial and adjudicative function that is not published; said statute is invalid as causing the deprivation of property and will cause the Plaintiff to be deprived of his property without due process of law, in violation of the Fourth, Fifth and Ninth Articles of Amendment to the Constitution of the United States of America.

16. To the extent that the regulations [26 CFR, § 31.3402(f)(2)-1(g) *et. seq.*], which purport to permit Defendant to determine the validity of the Plaintiff's statement with respect to withholding, were not published during the Notice and Comment period; improperly commingled the prosecutorial and adjudicative function in one official; required the Plaintiff to resort to the organization of the commingled prosecutorial and adjudicative function that is not published; said regulations are invalid as depriving the Plaintiff of his property without due process of law, in violation of the Fourth, Fifth and Ninth Articles of Amendment to the Constitution of the United States of America.

17. As is more fully described above, the Plaintiff is credibly informed and believes and therefore, alleges that the Defendant is preparing to levy upon Plaintiff's property in order to collect a $500.00 penalty alleged to have been assessed against him and has caused amounts to be withheld from the Plaintiff based upon the determination that his statement with respect to withholding was invalid.

18. The Plaintiff has no equally plain, speedy or adequate remedy to determine the validity of the statute and regulations enforced against him and his property and the Plaintiff will have no grounds for general damages against the offending officials due to qualified immunity, damages are otherwise difficult to obtain and the Plaintiff would be subjected to costly litigation in order to

recover any such damages arising from the enforcement of the invalid statutes and regulations.

19. The Plaintiff has a probability of success on the merits as the statutes and regulations and unless restrained and enjoined, by a temporary restraining order and preliminary injunction the Defendant will continue to enforce statutes, regulations and procedures of a type that have long been held to be invalid, resulting in the Plaintiff being further deprived of his property.

WHEREFORE, the Plaintiff respectfully requests relief as follows:

A. Trial by jury on all issues, so triable; and,

B. The Defendant be required to set forth the right and nature of its claims to the Plaintiff's property and rights to property; and,

C. Declare 26 U.S.C. § 6682 invalid as wanting in due process or that the statute requires proceedings comporting with standards of due process for the imposition of penalties punishing an act that is declared by law to be a crime; and,

D. Declare the regulations upon which the Defendant used to declare the Plaintiff's statement with respect to withholding invalid and that resulted in a higher rate of withholding than is authorized by law; and,

E. That a Temporary Restraining Order and Preliminary Injunction issue upon the Plaintiff's Motion and Permanent injunction issue enjoining the Defendant from levying upon the property belonging to the Plaintiff to satisfy the assessment of the alleged penalty under the challenged statute; and,

F. That a Temporary Restraining Order and Preliminary Injunction issue upon the Plaintiff's Motion and Permanent injunction issue enjoining the Defendant from withholding or causing the withholding at the higher rate based upon the determinations made under the challenged regulations; and,

G. That the Plaintiff be awarded reasonable fees and costs incident to the prosecution of this cause; and,

H. Such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this 23rd day of January, 1998.

/s/ Gary L. Smith
GARY L. SMITH
c/o 4620 North 89th Lane
Phoenix, Arizona 85037
(602) 872-0852

VERIFICATION

I, Gary L. Smith, verify under the penalty of perjury under the laws of the United States of America, that I am the Plaintiff herein, that I have read the foregoing complaint, it is true and correct, not interposed for any improper purpose and the claims herein are warranted by existing law or for the extension, modification, or reversal of existing law or the establishment of new law.

Date 1/23/98 /s/ Gary L. Smith
Gary L. Smith

GARY L. SMITH
c/o 4620 North 89th Lane
Phoenix, Arizona 85037
(602) 872-0852
Plaintiff, In Pro Per

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

GARY L. SMITH	) No. CIV 98-0139 PHX RCB
	)
Plaintiff	) SEPARATE STATEMENT
v.	) OF FACTS IN SUPPORT
v.	) OF RESPONSE TO
	) DEFENDANT'S MOTION
UNITED STATES OF AMERICA	) FOR SUMMARY
	) JUDGMENT
Defendant-Appellee	)
	)

The Plaintiff submits this Statement of Facts in Support of his Response to Defendant's Motion for Summary Judgment.

1. On March 29, 1974, the Internal Revenue Service published in the Federal Register beginning at Page 11572, its Organization and Function Manual. In the Annual Index for 1974 at Page 126, the Reference to the Organization and Functions is found. (Declaration of Gary L. Smith, ¶ 2)

2. The Plaintiff has searched the annual Index to the Federal Register for each year subsequent to 1974 through 1997. The Plaintiff found no other entries in the index to the Organization or Functions or if there was a reference to an Organization and Functions it was not the publication of the complete Organization and Functions of the Internal Revenue Service. (Smith Declaration, ¶ 3)

3. On March 19, 1981, the Secretary of Treasury caused to be published in the Federal Register temporary regulations related to withholding and the submission of certain withholding

certificates. (46 FR 17547). Those temporary regulations went into immediate effect and were codified in Code of Federal Regulations at 26 CFR 37.3402-1. (Smith Declaration, ¶ 4)

4. Also on March 19, 1981, the Secretary of Treasury caused to be published in the Federal Register a Notice of Proposed Rulemaking, with respect to Withholding Exemption Certificates. (46 FR 17566). The Notice of Proposed Rulemaking cross-referenced the Temporary Regulations as the text for the comment document. (Smith Declaration, ¶ 5)

5. In the Regulatory Flexibility Act comment block, the Secretary "concluded that the regulations proposed are interpretive and that the notice and public procedure requirements of 5 U.S.C. 553 do not apply. Accordingly, these proposed regulations are not subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6)." (Smith Declaration, ¶ 6)

6. On January 26, 1982, after the comment period had expired, the Secretary of Treasure cause to be published the final regulations. (47 FR 3546). These regulations are now found in 26 CFR § 31.3402(f)(2)-1(g). (Smith Declaration, ¶ 7)

7. On February 6, 1997, the Plaintiff filed a Declaration pursuant to 26 CFR § 1.1441-5 with Arizona Public Service Company (APS) stating that he was a citizen of the United States. (Smith Declaration, ¶ 8)

8. APS refused to comply with the provisions of the regulations and did not transmit the duplicate original as required by 26 CFR § 1.1441-5(c). (Smith Declaration, ¶ 9)

9. The Plaintiff subsequently received two letters dated February 18, 1997 and September 16, 1997 indicating that the Internal Revenue Service had determined that the Plaintiff had filed an "Employee's Withholding Allowance Certificate, does not meet the requirements of the Internal Revenue Code and related Employment Tax Regulations." (Smith Declaration, ¶ 10)

10. This determination was "[b]ased on our information." The letter then stated that APS would be instructed to withhold at the rate for a person that is Single with zero (0) allowances. The September 16, 1997 letter also threatened to impose a $500.00

penalty under 26 U.S.C. § 6682 for filing a false statement with respect to withholding. (Smith Declaration, ¶ 11)

11. The Plaintiff objected in writing to these determinations on the ground that the February 18, 1997 and September 16, 1997 letter failed to state what the information was upon which they based their determination. The Plaintiff requested a hearing before the assessment of the $500.00 and reconsideration of the determination of the withholding status. (Smith Dec., ¶ 12)

12. On November 3, 1997, the Plaintiff received notice that he had been assessed the $500.00 penalty for allegedly filing false statements with respect to withholding. The letter further offered the Plaintiff an opportunity to submit an explanation why the penalty might be reduced or eliminated. (Smith Dec., ¶ 13)

13. On November 10, 1997, the Plaintiff requested an extension of time until such time as he received a hearing and the documentation upon which the IRS based its information. (Smith Declaration, ¶ 14)

14. On November 10, 1997, the Plaintiff also made a Freedom of Information Act Request (FOIA) for the information involved in the determination of the withholding status and alleged assessment of the $500.00 penalty. (Smith Declaration, ¶ 15)

15. On or about December 1, 1997, the Plaintiff received a Final Notice, notice of intent to levy with respect to the $500.00 penalty. (Smith Declaration, ¶ 16)

16. On or about February 5, 1998, the Plaintiff received a letter stating that the IRS has stopped collection on the account for 12 weeks. (Smith Declaration, ¶ 17)

17. On or about April 13, 1998, the Plaintiff received a second Final Notice, notice of intent to levy with respect to the $500.00 penalty. (Smith Declaration, ¶ 18)

18. On April 21, 1998, the Plaintiff again responded to the April 13, 1998 Final Notice again repeating his request for the proceeding originally offered in the November 3, 1998 letter. (Smith Declaration, ¶ 19)

19. On or about July 1, 1998, the Plaintiff received his response to his November 10, 1997 FOIA. The request had gone through

appeals to the Commissioner before it was ordered to be responded to. In the last paragraph of the letter, the responding officer stated that there were no documents responsive to the request for information regarding the penalty, because no penalty had been assessed. (Smith Declaration, ¶ 20)

RESPECTFULLY SUBMITTED this 13th day of October, 1998.

/s/ Gary L. Smith
GARY L. SMITH
c/o 4620 North 89th Lane
Phoenix, Arizona 85037
(602) 872-0852
Plaintiff, In Pro Per

COPIES of the foregoing were delivered this 13th day of October, 1998, to:

JOSE de JESUS RIVERA
United States Attorney
230 North First Avenue #4000
Phoenix, Arizona 85025

and mailed to:

CHARLES DUFFY
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044
Attorneys for the Plaintiff

JOSE de JESUS RIVERA
United States Attorney
4000 U.S. Courthouse
230 North First Avenue
Phoenix, Arizona 85025
Telephone: (602) 514-7500

CHARLES M. DUFFY
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-6406

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

GARY L. SMITH	)	
	)	No. CIV 98-0139 PHX RCB
Plaintiff	)	
v.	)	STATEMENT OF
	)	SUPPORT OF THE
UNITED STATES OF AMERICA	)	UNITED STATES' MOTION
	)	FOR SUMMARY
Defendant-Appellee	)	JUDGMENT
	)	

This Statement of Facts is submitted in support of the United States' Motion for Summary Judgment, which is filed herewith.

1. On November 3, 1997, the Internal Revenue Service (IRS) made a penalty assessment (hereafter "the assessment") under 26 U.S.C. § 6682 against Gary L. Smith (hereafter "the plaintiff") with respect to his 1997 federal income tax year. See the Declaration of Ray Banks (hereafter "the Banks' Declaration") at ¶¶ 2 and 3; also see Exhibit A attached to the Banks' Declaration.

2. The assessment was made based on false information set forth on an IRS Form W-4 that was submitted by the plaintiff. See the Banks' Declaration at ¶ 4.

3. As of August 4, 1998, there remained an outstanding balance owed on the assessment. Id. at ¶ 5.

Dated this 10 day of August, 1998.

JOSE de JESUS RIVERA
United States Attorney

/s/ Charles M. Duffy
CHARLES M. DUFFY
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 683
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 307-6406

APPENDIX B
STATUTES

Page Left Blank

TABLE OF CONTENTS

APPENDIX B

SUBJECT	PAGE
CONSTITUTIONAL PROVISIONS	B-1
Fifth Amendment	B-1
STATUTES	B-1
5 U.S.C. § 553	B-1
5 U.S.C. § 503	B-2
26 U.S.C. § 6212(a) and (b)	B-4
26 U.S.C. § 6213(a)	B-5
26 U.S.C. § 6682	B-6
26 U.S.C. § 7205	B-6
26 U.S.C. § 7421	B-7
REGULATIONS	B-7
26 CFR § 31.3402(f)-1(g)	B-7
MISCELANEOUS PROVISIONS	B-11
§ 29 NATIONAL PROHIBITION ACT	B-11
§ 35 NATIONAL PROHIBITION ACT	B-12

Page Left Blank

CONSTITUTIONAL PROVISIONS

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

5 U.S.C. § 553

Sec. 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved -

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except when notice or hearing is required by statute, this subsection does not apply -

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except -

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 603

Sec. 603. Initial regulatory flexibility analysis

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rulemaking for any proposed rule, or publishes a notice of proposed rulemaking for an interpretative rule involving the internal revenue laws of the United States, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or

a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration. In the case of an interpretative rule involving the internal revenue laws of the United States, this chapter applies to interpretative rules published in the Federal Register for codification in the Code of Federal Regulations, but only to the extent that such interpretative rules impose on small entities a collection of information requirement. -

(b) Each initial regulatory flexibility analysis required under this section shall contain -

(1) a description of the reasons why action by the agency is being considered;

(2) a succinct statement of the objectives of, and legal basis for, the proposed rule;

(3) a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply;

(4) a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record;

(5) an identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.

(c) Each initial regulatory flexibility analysis shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of applicable statutes, the analysis shall discuss significant alternatives such as -

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities;

(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;

(3) the use of performance rather than design standards; and

(4) an exemption from coverage of the rule, or any part thereof, for such small entities.

26 U.S.C. § 6212(a) and (b)

Sec. 6212. Notice of deficiency

(a) In general. If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitles A or B or chapter 41, 42, 43, or 44 he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail. Such notice shall include a notice to the taxpayer of the taxpayer's right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.

(b) Address for notice of deficiency. (1) Income and gift taxes and certain excise taxes. In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44 if mailed to the taxpayer at his last known address, shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

(2) Joint income tax return. In the case of a joint income tax return filed by husband and wife, such notice of deficiency may be a single joint notice, except that if the Secretary has been notified by either spouse that separate residences have been established, then, in lieu of the single joint notice, a duplicate original of the joint notice shall be sent by certified mail or registered mail to each spouse at his last known address.

(3) Estate tax. In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by chapter 11, if

addressed in the name of the decedent or other person subject to liability and mailed to his last known address, shall be sufficient for purposes of chapter 11 and of this chapter.

26 U.S.C. § 6213(a)

Sec. 6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment. Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852, or 6861 no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court, and a refund may be ordered by such court of any amount collected within the period during which the Secretary is prohibited from collecting by levy or through a proceeding in court under the provisions of this subsection. The Tax Court shall have no jurisdiction to enjoin any action or proceeding or order any refund under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. Any petition filed with the Tax Court on or before the last date specified for filing such petition by the Secretary in the notice of deficiency shall be treated as timely filed.

26 U.S.C. § 6682

Sec. 6682. False information with respect to withholding

(a) Civil penalty. In addition to any criminal penalty provided by law, if -

(1) any individual makes a statement under section 3402 or section 3406 which results in a decrease in the amounts deducted and withheld under chapter 24, and

(2) as of the time such statement was made, there was no reasonable basis for such statement, such individual shall pay a penalty of $500 for such statement.

(b) Exception. The Secretary may waive (in whole or in part) the penalty imposed under subsection (a) if the taxes imposed with respect to the individual under subtitle A for the taxable year are equal to or less than the sum of -

(1) the credits against such taxes allowed by part IV of subchapter A of chapter 1, and

(2) the payments of estimated tax which are considered payments on account of such taxes.

(c) Deficiency procedures not to apply. Subchapter B of chapter 63 (relating to deficiency procedures for income, estate, gift, and certain excise taxes) shall not apply in respect to the assessment or collection of any penalty imposed by subsection (a).

26 U.S.C. § 7205

Sec. 7205. Fraudulent withholding exemption certificate or failure o supply information

(a) Withholding on wages. Any individual required to supply information to his employer under section 3402 who willfully supplies false or fraudulent information, or who willfully fails to supply information thereunder which would require an increase in the tax to be withheld under section 3402, shall, in addition to any other penalty provided by law, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

(b) Backup withholding on interest and dividends. If any individual willfully makes a false certification under paragraph (1) or (2)(C) of section 3406(d), then such individual shall, in addition to any other penalty provided by law, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both.

26 U.S.C. Section 7421

Sec. 7421. Prohibition of suits to restrain assessment or collection.

(a) Tax. Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6331(i), 6672(b), 6694(c), and 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

(b) Liability of transferee or fiduciary. No suit shall be maintained in any court for the purpose of restraining the assessment or collection (pursuant to the provisions of chapter 71) of -

(1) the amount of the liability, at law or in equity, of a transferee of property of a taxpayer in respect of any internal revenue tax, or

(2) the amount of the liability of a fiduciary under section 3713(b) of title 31, United States Code (FOOTNOTE 1) in respect of any such tax.

REGULATIONS

26 CFR § 31-3402(f)-1(g)

Sec. 31.3402(f)(2)-1 Withholding exemption certificates

(g) Submission of certain withholding certificates--(1) *General rule.* With respect to withholding exemption certificates received after November 30, 1986, an employer shall submit, in accordance with paragraph (g)(3) of this section, a copy of any withholding exemption certificate, together with a copy of any

written statement received from the employee in support of the claims made on the certificate, which is received from the employee during the reporting period (even if the certificate is not in effect at the end of the quarter) if the employee is employed by that employer on the last day of the reporting period and if – (i) The total number of withholding exemptions (within the meaning of section 3402(f)(1) and the regulations thereunder) claimed on the certificate exceeds 10, or (ii) The certificate indicates that the employee claims a status exempting the employee from withholding, and the exception provided by paragraph (g)(2) of this section does not apply.

(2) *Exception.* A copy of the certificate shall not be submitted under paragraph (g)(1)(ii) of this section if the employer reasonably expects, at the time the certificate is received, that the employee's wages (under chapter 24 of the Code) from that employer shall not then usually exceed $200 per week.

(3) *Rules for submission*–(i) In general. The reporting period is a calendar quarter. Copies required to be submitted under paragraph (g)(1) of this section shall be submitted at the time and place of filing Form 941 or 941E for the reporting period, or Form 941-M for the last month of the reporting period. Form 941, 941E or 941-M shall be used, in accordance with the instructions for the form, to transmit the copies. (ii) Option. At the choice of the employer, copies required to be submitted under paragraph (g)(1) of this section may be submitted earlier and for shorter reporting periods than a calendar quarter. In such case, the employer shall submit the copies to the service center where the employer would file a Form 941 or 941E and shall include with the submission a statement showing the employer's name, address, employer identification number, and the number of copies of withholding exemption certificates submitted. However, in no event shall a copy be submitted later than the time for filing the report required to be submitted for the calendar quarter reporting period under subdivision (i) of this paragraph (g)(3). (iii) First report. The first submission of copies shall include a copy of any certificate

required to be submitted under paragraph (g)(1) of this section which is received by the employer on or after April 1, 1980.

(4) *Other withholding exemption certificates.* An employer shall also submit a copy of any currently effective withholding exemption certificate (or make the original certificate available for inspection), together with a copy of any written statement received from the employee in support of the claims made on the certificate, upon written request of the Internal Revenue Service. This request of the Service may relate either to one or more named employees or to one or more reasonably segregable units of the employer. In this regard, the Service may, by written notice, advise the employer that a copy of each new withholding exemption certificate received from one or more named employees, or from one or more reasonably segregable units of the employer, which is required, under this paragraph (g) to be submitted to the Service is to be submitted to the District Director. The employer shall then submit to the District Director a copy of each such new certificate of each such employee immediately after the employer receives the new certificate from the named employee.

(5) *Computation of withholding.* (i) Until receipt of written notice from the Internal Revenue Service that a certificate, a copy of which was submitted under this section, is defective, that certificate is effective and the employer shall withhold on the basis of the statements made in that certificate, unless that certificate must be disregarded under the provisions of paragraph (g)(5)(vi) of this section. (ii) The Internal Revenue Service may find that a copy of a withholding exemption certificate submitted contains a materially incorrect statement or it may determine, after written request to the employee for verification of the statements on the certificate, that it lacks sufficient information to determine if the certificate is correct. If the Internal Revenue Service so finds or determines and notifies the employer in writing that the certificate is defective, the employer shall then consider the certificate to be defective for purposes of computing amounts of withholding. (iii) If the Internal Revenue Service notifies the

employer that the certificate is defective, the Internal Revenue Service will, based upon its findings, advise the employer that the employee either is not entitled to claim a status exempting the employee from withholding or is not entitled to claim a total number of withholding exemptions in excess of a number specified by the Internal Revenue Service in the notice, or both. The Internal Revenue Service will also specify the Internal Revenue Service office to be contacted for further information. (iv) The Internal Revenue Service will provide the employer with a copy for the employee of each notice it furnishes to the employer under this paragraph (g)(5) in addition to the notice furnished to the employer for his own use. The Internal Revenue Service will also mail a similar notice to the employee at the address of the employee as shown on the certificate under review. (v) The employer shall promptly furnish the employee who filed the defective certificate, if still in his employ, with a copy of the written notice of the Internal Revenue Service with respect to the certificate and may request another withholding exemption certificate from the employee. The employer shall withhold amounts from the employee on the basis of the maximum number specified in the written notice received from the Service. (vi) If and when the employee does file any new certificate (after an earlier certificate of the employee was considered to be defective), the employer shall withhold on the basis of that new certificate whenever filed) as currently effective only if the new certificate does not make a claim of exempt status or of a number of withholding exemptions which claim is inconsistent with the advice earlier furnished by the Internal Revenue Service in its written notice to the employer. If any new certificate does make a claim which is inconsistent with the advice contained in the Service's written notice to the employer, then the employer shall disregard the new certificate, shall not submit that new certificate to the Service, and shall continue to withhold amounts from the employee on the basis of the maximum number specified in the written notice received from the Service. (vii) If the employee makes a claim on any new certificate that is inconsistent with the

advice in the Service's written notice to the employer, the employee may specify on such new certificate, or by a written statement attached to that certificate, any circumstances of the employee which have changed since the date of the Service's earlier written notice, or any other circumstances or reasons, as justification or support for the claims made by the employee on the new certificate. The employee may then submit that new certificate and written statement either to (A) the Internal Revenue Service office specified in the notice earlier furnished to the employer under this paragraph (g)(5), or to (B) the employer, who must then submit a copy of that new certificate and the employee's written statement (if any) to the Internal Revenue Service office specified in the notice earlier furnished to the employer. The employer shall continue to disregard that new certificate and shall continue to withhold amounts from the employee on the basis of the maximum number specified in the written notice received from the Service unless and until the Internal Revenue Service by written notice (under paragraph (g)(5)(iii) of this section) advises the employer to withhold on the basis of that new certificate and revokes its earlier written notice.

(6) Definition of employer. For purposes of this paragraph (g), the term ``employer'' includes any individual authorized by the employer to receive withholding exemption certificates, to make withholding computations, or to make payroll distributions.

MISCELLANEOUS PROVISIONS

§ 29. National Prohibition Act

Sec. 29. Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $ 200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

§ 35, National Prohibition Act

Sec. 35. All provisions of law that are inconsistent with this act are repealed only to the extent of such inconsistency and the regulations herein provided for the manufacture or traffic in intoxicating liquor shall be construed as in addition to existing laws. This act shall not relieve anyone from paying any taxes or other charges imposed upon the manufacture or traffic in such liquor. No liquor revenue stamps or tax receipts for any illegal manufacture or sale shall be issued in advance, but upon evidence of such illegal manufacture or sale a tax shall be assessed against, and collected from, the person responsible for such illegal manufacture or sale in double the amount now provided by law, with an additional penalty of $ 500 on retail dealers and $1,000 on manufacturers. The payment of such tax or penalty shall give no right to engage in the manufacture or sale of such liquor, or relieve anyone from criminal liability, nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws.

The Commissioner, with the approval of the Secretary of the Treasury, may compromise any civil cause arising under this title before bringing action in court; and with the approval of the Attorney General he may compromise any such cause after action thereon has been commenced.